STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 9, 2003
v	No. 240811 Charlevoix Circuit Court
SAMUEL JOSEPH RIPLEY, Defendant-Appellant.	LC No. 01-063909FH

Before: Smolenski, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court sentenced defendant to two years probation with the first 12 months in jail. We affirm.

Defendant first argues that the trial court committed error warranting reversal by improperly admitting pursuant to MRE 608 evidence of the truthful character of the victim. We disagree. We review the trial court's admission or exclusion of evidence for a clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001); *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). But, where the admissibility of evidence depends on a preliminary question of law, as here, appellate review is de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id*.

MRE 608 provides in pertinent part:

> (a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Defendant relies on *Lukity*, *supra*, arguing that admitting evidence of the victim's truthful character was improper because the defense never attacked the victim's character for truthfulness. Defendant misinterprets and misapplies our Supreme Court's *Lukity* decision.

"Where a defense counsel attacks a witness' character for truthfulness in an opening statement, the prosecution may present evidence that supports the witness' character for truthfulness on direct examination." *Lukity, supra* at 489. In *Lukity*, defense counsel contended in opening statement that the offense did not occur, and that the complainant had serious problems that affected her ability to recount and describe what occurred. *Id*. at 489-490. The trial court found that because this opening statement attacked the complainant's credibility, it permitted evidence of the complainant's truthful character. *Id*. at 490. Our Supreme Court disagreed and explained:

> The trial court's ruling failed to note the distinction between credibility and character for truthfulness and the implications of this distinction. Credibility is defined as "[w]orthiness of belief; that quality in a witness which renders his evidence worthy of belief." Black's Law Dictionary (6th ed), p 366. Credibility may be attacked in numerous ways, e.g., demonstrating a witness' inability to perceive or remember the event at issue. Attacking a witness' character for truthfulness is one of the means by which a witness' credibility may be attacked. Thus, the two terms are not synonymous; rather, character for truthfulness is a specific aspect of credibility. [*Lukity, supra* at 490.]

Our Supreme Court concluded in *Lukity* that although the defendant had attacked the complainant's credibility by denigrating her ability to recount and describe the charged incident, "defense counsel did not accuse [the] complainant of intentionally lying," and therefore, "did not attack her character for truthfulness, i.e., . . . did not suggest that she was lying." *Lukity, supra* at 490-491. Accordingly, our Supreme Court held the trial court abused its discretion by allowing evidence of complainant's character for truthfulness when her character for truthfulness had not been attacked. *Id.* at 491.

In the case at bar, although defendant never directly called the victim a liar, defense counsel indicated in his opening statement that the jury would hear conflicting versions of what happened in the locker room of the community pool where the offense was alleged to have occurred. Further, defense counsel informed the jury it would be required to determine which witnesses were being truthful, implying that some testimony would be false. In the context of this case, where only the victim and defendant were present at the time of the alleged offense, the defense implied that the victim was lying. Defense counsel further reinforced his defense with the statement that defendant would "tell [the jury] exactly what occurred between him and [the victim]." The clear thrust of the defendant's case was that the victim's version of events was not the truth, and that defendant's version was "exactly what occurred." Moreover, defense counsel went beyond suggesting that the evidence would be insufficient to overcome the presumption of innocence, and in fact, implied that the evidence proved defendant to be innocent.

Counsel followed up on this defense theme when he questioned the prosecutor's first witness, the victim's mother, as to whether her yelling at the victim to hurry up might have upset him. Further, defense counsel asked the victim's mother if her calling into the locker room for the victim could "have made [the victim] concerned enough to, perhaps, fabricate a story as to why it took so long." Although the prosecutor objected to the question, and the trial court sustained it, the question and the witness's answer, "no," were not stricken. Defense counsel

returned to this theme in closing argument by again suggesting that the victim might have made up the offense to explain his delay in the locker room.

Defendant's testimony at trial directly contradicted the victim's account of the offense. Defendant testified that he never touched the victim's penis; he did not talk to the victim about masturbating; and he did not become aroused in the victim's presence. Defendant also testified that the victim appeared to be talking to an imaginary friend while getting dressed in the locker room. Defendant further testified that he feared being alone with children because, people might incorrectly assume something was wrong. During cross-examination, defendant explained that his fear of being alone with children came from his watching television where "people get falsely accused of things," and he "always had this phobia . . . that some day this might . . . happen." Defendant also claimed that he knew what children are like: they lie and fantasize.

Defense counsel's opening statement together with defendant's testimony clearly implied the victim's testimony was untruthful and that defendant was falsely accused. Although defendant suggested that the victim might have fantasized the incident, the defense also suggested that the victim's testimony could be a purposeful lie. Because the defense attacked the victim's truthfulness, the trial court did not abuse its discretion by admitting evidence of the victim's truthful character. MRE 608(a); *Lukity*, *supra* at 490-491.

Defendant advances two additional arguments on this issue, both of which lack merit. First, defendant argues that the prosecutor's questions on cross-examination baited defendant into giving an answer permitting rebuttal. The prosecution cannot use cross-examination to revive a right to introduce evidence that was disallowed in its case-in-chief. *People v Losey*, 413 Mich 346, 352; 320 NW2d 49 (1982). But rebuttal evidence may address a matter raised by the defense on which the prosecutor elicits details on cross-examination. *Losey*, *supra* at 352 n 3. Our Supreme Court has explained, "the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Here, because one theory defendant advanced was that the victim intentionally fabricated the offense, the rebuttal evidence properly responded to this theory.

Defendant also argues that the prosecutor's character witnesses were improperly permitted to testify to other observations about the victim, including that the victim was a hard-working, responsible, intelligent student, and a happy, strong-willed child. Defendant contends this testimony strayed beyond that permitted by MRE 608(a)(1). Defendant, however, did not object to the testimony on this basis. In a sidebar conference, defendant objected after some of the testimony had been admitted but the objection was only that there was nothing for the prosecutor to rebut. Accordingly, defendant has not preserved this argument, MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). This Court's review is limited to plain error effecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW 2d 130 (1999). Here, the evidence was arguably admissible to show the witnesses' knowledge of the victim. Therefore, any error was not plain, nor is reversal warranted because it does not affirmatively appear that the evidence resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings,

independent of defendant's guilt or innocence. *Id.*; *People v Coy*, 243 Mich App 283, 312-313; 620 NW2d 888 (2000). Moreover, even if error occurred and was preserved, reversal is not warranted because after an examination of the entire cause, it does not affirmatively appear more probable than not that the error was outcome determinative. *Lukity, supra* at 495-496.

Next, defendant argues he was denied a fair trial by the prosecutor's argument that defendant fit a "profile" of someone who would commit the charged offense. Defendant claims the prosecutor did so by improperly introducing character evidence of the victim's truthfulness, by overemphasizing the victim's truthfulness, and by improperly asking defendant to comment on the victim's credibility. We disagree.

A defendant's claim that a prosecutor's misconduct denied him a fair trial must be preserved by timely and specific objection accompanied by a request for a curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Here, defendant's only objection was to the prosecutor's argument that defendant fit the "profile" of a person who would commit the offense. The trial court interrupted the prosecutor and immediately ruled that, "[t]here's no evidence to that effect that you can't argue anything that's not based on the evidence." Defendant did not request a further curative instruction.

We review claims of prosecutorial misconduct de novo but review a trial court's factual findings for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test is whether the prosecutor's alleged misconduct denied defendant a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Here, most of the alleged error was unpreserved because defendant failed to object contemporaneously and to request a curative instruction; therefore, our review is for plain error affecting substantial rights. *Watson, supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings, independent of the guilt or innocence of the defendant. *Carines, supra* at 763, 774; *Schutte, supra* at 720. Where a curative instruction could have alleviated any prejudice, there can be no error warranting reversal. *Watson, supra*; *Schutte, supra* at 721.

This Court reviews allegations of prosecutorial misconduct on a case-by-case basis and examines the pertinent portion of the record to evaluate a prosecutor's remarks in context, *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and in light of on all the facts of the case, *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). A prosecutor's comments must also be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.; Schutte, supra* at 721. Furthermore, otherwise improper remarks by a prosecutor might not require reversal if made in response to issues the defense has raised. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *Schutte, supra.*

A prosecutor may not assert as a fact to the jury something the evidence does not support, but he may argue the evidence and any reasonable inferences that may arise from it. *Bahoda, supra* at 282; *Schutte, supra* at 721. Here, no evidence adduced at trial supported the prosecutor's comment that defendant fit the "profile" of a person who would commit the offense.

But the trial court immediately interrupted the prosecutor and ruled that, "There's no evidence to that effect that [sic] you can't argue anything that's not based on the evidence." Moreover, the trial court properly instructed the jury on the presumption of innocence and burden of proof, that the attorneys' statements were not evidence, and that "[y]ou should only accept things that an attorney said that are supported by the evidence or by your own common sense and general knowledge." Because the trial court ruled that the prosecutor's comment was unsupported by evidence and so instructed the jury, defendant suffered no prejudice from the comment. *Bahoda, supra* at 281; *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant received a fair and impartial trial.

The prosecutor did not engage in misconduct by seeking to admit evidence of the victim's character for truthfulness because the evidence was properly admitted. Moreover, it is not misconduct for the prosecutor to seek admission of evidence in good faith. *Noble, supra* at 660. Likewise, the prosecutor is accorded great latitude to argue the evidence and all reasonable inferences arising from it as it relates to the prosecutor's theory of the case, *Bahoda*, *supra* at 282, including arguing the credibility of witness, *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Finally, defendant argues that misconduct warranting reversal occurred when the prosecutor asked defendant if he thought it odd for a nine-year-old boy to make up the allegations. Defendant answered that he did think it was odd that the victim would make up a story but that children do lie and fantasize. Defendant further added that he wondered where the victim got it [the accusation], but it did not come from him. Generally, it is improper for a prosecutor to ask the defendant to comment on the credibility of prosecution witnesses because defendant's opinion of their credibility is not relevant. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). The prosecutor's conduct, however, must be viewed in context, *Rodriguez, supra* at 30. Otherwise improper conduct may not require reversal if it occurred in response to issues the defense raised, *Duncan*, *supra* 16. Here, defendant theorized that the victim's allegations were false either because they were fantasy or lies. Defendant advanced this theory through opening statement, questions to witnesses, his own testimony, and in closing argument. As in *Buckey, supra*, it is difficult to discern how the prosecutor's questions prejudiced defendant. The questions actually permitted defendant to advance his theory that he was innocent and that the victim had either lied or had fantasized the offense. See also *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Furthermore, an instruction could have cured any prejudice, so plain error warranting reversal did not occur. *Watson*, *supra* at 586; *Knapp*, *supra*.

We affirm defendant's conviction and sentence.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Kurtis T. Wilder